

**A Modern Approach to Analyzing the Ancient Question:
“What The _____ were they thinking?”
Exploring the Self destructive decisions in Lawyers’ behavior.¹**

I Understanding the problem

The most reoccurring ethical complaints are 1.1 Competence, 1.3 Diligence, 1.4 Communication and 1.5 Fees. The question we all ask ourselves when we read disciplinary decisions on these complaints is: “What were they thinking? To help answer that question this program explores the nature of human behaviors of focus, relativity, anchoring and the human fudge factor, as they effect law practice management and ethical behavior. Studies show it is not that we don’t know what to do it is that we don’t do it

Unethical conduct is not the cause of any problem; it is rather the inevitable result of a constellation of problems. An analogy would be the fire triangle. Fire is the result of the combination of fuel, heat and oxygen. All three are useful individually and only dangerous when combined. In the same way unethical behavior requires combination of; conflict, judgment and action. Again individually each is necessary to and valuable to daily management but dangerous when combined is an ethical vacuum.

While you can never eradicate ethics violations buy studying past violations, as we cannot eliminate fire by studying past fires, you can develop a matrix for diagnosis of those unethical behaviors. Once studied you can either eliminate the outside factor which lead to unethical behavior or eliminate the offender. Because studies show that environmental factors, are the leading cause of unethical conduct. The better course of action therefore is to modify the environment to create an ethical law office.

II What are the factors of competence?

1.1 Client-Lawyer Relationship: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation

A. Passion equals Competence

Like attorneys other professions struggle with the issue of professional competence. Each field each year makes another set of standards and or rules to better achieve compliance and improve production in their respective profession. While each has it own set of directives most monitor the success or failure of competence by outcome based performance testing. In production based industry they ask did we make it more efficient, in safety compliance, did we make it safer, in drugs and medicine did we save more people with the treatment or procedure.

¹ Presenter: LJ Leatherman, Managing Partner of Palmer, Leatherman, White & Dalton LLP. Presented to: The Wichita Bar Association, Wichita Kansas November 12, 2010.

These procedures are telling and useful when all parties start with the same raw material and same or similar goals

As lawyers this is a bit more difficult. More than in any other profession, in trial each there is a successful and an unsuccessful outcome each time. In addition the solution which is profitable and efficient for one side is damaging and lacks due process for the other. With this adversarial based outcome analysis often leads to a misinterpretation of data regarding outcome based testing as to proficiency.

This problem is however shared by other professions. A good example is in the world of teaching. Teacher as a profession find it difficult to evaluate the effectiveness of teachers based on the outcome of students. In addition to the students being individually unique, and even more each group of students being unique as to any other group based on demographic, sociological, ethnicity, and language development. With this atypical base line, how can you measure a teacher who begins with underperforming kids against a teacher of advanced college bound students? If you due measure them as to performance which teacher is better? The teacher who starts with a group of underperforming students and creates a group of students who all have minimal proficiency or the teacher who starts with advanced college bound students and produces the same?

With this in mind and in search of a valid evaluation of teacher performance the DeBruyn Institute, researched what factors lead to the best and most competent teachers in our primary schools. In surveying and testing thousand of teachers and surveying thousands of administrators, parents, students and then collating the data, and comparing it to perceived ideas of what made the most competent teacher, the institute determined the top 64 traits of successful teachers.

The most revealing piece of information is that among the traits of a successful competent teacher, subject matter competence ranked 44th of 69. It did not even make the top half of the most important traits. What this tells us is that knowledge of a subject is of very little importance to outcome when viewing execution. The second most interesting is that the top four traits in predicting competence are: 1) A dedicated environment; 2) A passion to teach 3) A Respect for the discipline and; 4) A desire for excellence.²

These same finding are reflected in production based surveys regarding other environments. Happier workers are more productive workers according to a new study that shows that offering comprehensive depression treatment may help employers improve their bottom line. According to *The Health Behavior News Service*, studies show that depressed workers who received "enhanced" depression treatment from specially trained health care providers were more productive at work and missed fewer workdays than those who received standard treatment.³ That additional productivity added up to an estimated annual value of \$2,601 per depressed full-time employee. The study is the first to demonstrate that improving the quality of care for any chronic disease can increase productivity and decrease worker absenteeism.

² Robert DeBryan and Tracy DeBryan; What Is A Master Teacher?Pub. The Master Teacher, 2009 pp.11

³ Edited excerpt from news release by Health Behavior News Service regarding Rost, K., *Medical Care*, December, 2004; vol. 42: pp 1202-1210.

According to Kathryn Rost, PhD., over the short term, improvements in productivity generally benefit the majority of American employers who pay salaries rather than reimburse workers for piecework or by commission. Kathryn Rost, who is with the University of Colorado Health Sciences Center, adds "Over the longer term, improvements in productivity may translate into employee raises."

In the study, which appears in the December 2004 issue of the *Journal of Medical Care*, researchers compared the effects of depression treatment in a group of 326 full or part-time workers who were diagnosed with depression. The workers were randomly assigned to receive either standard depression treatment or "enhanced" treatment from specially trained health care providers who encouraged workers to consider antidepressant medication and/or counseling.

The patients in the enhanced care group were also contacted in person or over the phone to reassess their symptoms periodically and educate them about depression treatment options. The provider also encouraged the patient to stick with their depression treatment and adjusted the treatment plan as needed. Researchers measured the effects of the two treatment approaches on worker productivity, as collected by the patients' reports of their effectiveness at work, and the total number of missed work hours due to illness or doctor visits over the course of two years.

The results showed that the enhanced-care depression treatment group reported a 6.1 percent increased productivity over two years. The intervention improved productivity by 8.2 percent among consistently employed depressed workers. The annual economic benefit associated with this improvement in consistently employed workers is \$1,982 per depressed full-time employee. In addition, improved depression treatment reduced absenteeism by 28.4 percent or 12.3 days over this two-year period for an estimated annual value of \$619 per depressed full-time employee.

These benefits were substantially greater than those gained by those who had standard depression treatment. Researchers say employers often ask for evidence of the value of health interventions in business terms they can understand, and these results may provide that proof. "Corporations employing stable workforces whose business interests are served by present and productive workers have reason to encourage health plans to improve primary care depression treatment," write the researchers. "In ensuring benefits for themselves, corporations may also contribute to improving their employees' lives." .

B. Depression, the Lawyers' Epidemic: How You Can Recognize the Signs

Depression is a dangerous disease, and lawyers are more prone to it than members of any other profession. Consider these numbers accumulated by Raymond P. Ward⁴.

A 1990 study at Johns Hopkins University found that of 28 occupations studied lawyers were the most likely to suffer depression and were more than 3.6 times more likely than average to do so.⁵

⁴ Excerpt from Raymond P. Ward, A Recovering Perfectionist, is an appellate lawyer with Adams and Reese in New Orleans. He blogs on *Minor Wisdom* and occasionally contributes to *Naked Ownership*, [Appellate Law & Practice](#), and the [New Orleans Metroblog](#). He serves as publications chair for the DRI Appellate Advocacy Committee and edits the committee's semi-annual newsletter, [Certworthy](#).

A research study of 801 lawyers in the State of Washington found that 19% suffered from depression.⁶

A quality-of-life survey by the North Carolina Bar Association in 1991 revealed that almost 26% of respondents exhibited symptoms of clinical depression, and almost 12% said they contemplated suicide at least once a month.⁷

Left untreated, depression can be fatal. According to the National Institute of Mental Health, 15% of people with clinical depression commit suicide.⁸ Surveys of lawyers in Washington and Arizona showed that most lawyers suffering from depression also have suicidal thoughts.⁹ One study found that lawyers have a much greater risk of acting on their suicidal thoughts and succeeding in doing so.¹⁰ Suicide ranks among the leading causes of premature death among lawyers.¹¹ The 1992 Annual Report of the National Institute of Occupational Safety and Health reported that male lawyers are twice as likely as the general population to commit suicide.¹²

Why are lawyers more prone than anyone else to this dangerous disease? Psychologist Lynn Johnson points to two personality traits many lawyers have: perfectionism and pessimism. It's no secret that the legal profession attracts perfectionists and rewards perfectionism. Perfectionism drives us to excel in college, in law school, and on the job. But perfectionism has a dark side; it can produce "a chronic feeling that nothing is good enough."¹³ Perfectionists "are driven by an intense need to avoid failure.... [T]hey are unable to derive satisfaction from what ordinarily might be considered even superior performance."¹⁴ According to Johnson, perfectionism raises levels of the stress hormone, cortisol, and chronically high levels of cortisol lead to various health problems, including depression. *Id.* And when we make the inevitable mistake, perfectionism magnifies the failure. "Perfectionists are more vulnerable to depression and anxiety, harder to treat with either therapy or drugs, and much more likely to commit suicide when things go very wrong."¹⁵

Less intuitive than the prevalence of perfectionism is the prevalence of pessimism among lawyers. A Johns Hopkins study in 1990 showed that in all graduate school programs in all professional fields except one, optimists outperform pessimists. The one exception: law school.¹⁶ As Richard Uday points out, pessimism helps us excel: it makes us skeptical of what our clients,

⁵ A. Harrison Barnes, Builders and Destroyers (citing W.W. Eaton, J.C. Anthony, W. Mandel & R. Garrison, Occupations and the Prevalence of Major Depressive Disorder, 32 J. Occupational Med. 1079 (1990)).

⁶ Barnes, *supra* (citing G.A.H. Benjamin, E.J. Darling & B.D. Sales, The Prevalence of Depression, Alcohol Abuse, and Cocaine Abuse Among United States Lawyers, 13 J. Law & Psychiatry 233 (1990)).

⁷ Michael J. Sweeney, The Devastation of Depression.

⁸ Don P. Jones & Michael J. Crowley, "I wish I would have called you before....".

⁹ Joan E. Munteer, Depression Among Lawyers, 33 Colo. Lawyer 35 (Jan. 2004).

¹⁰ *Id.*

¹¹ Richard G. Uday, That Frayed Rope, Utah State Bar J., Aug./Sept. 2003 (citing Meyer J. Cohen, Bumps in the Road, GPSOLO, July/Aug. 2001, at 20).

¹² Lynn Johnson, Stress Management, Utah State Bar J., Jan./Feb. 2003.

¹³ *Id.*

¹⁴ Don P. Jones & Michael J. Crowley, "I wish I would have called you before ..." (citing Blatt, Sidney J., Ph.D. "The Destructiveness of Perfectionism: Implications for the Treatment of Depression," American Psychologist, Vol. 49, No. 12, pp.1003-1020 (1997)).

¹⁵ Lynn Johnson, Stress Management, Utah State Bar J., Jan./Feb. 2003.

¹⁶ Richard G. Uday, That Frayed Rope, Utah State Bar J., Aug./Sept. 2003.

our witnesses, opposing counsel, and judges tell us. It helps us anticipate the worst, and thus prepare for it. But pessimism is bad for our health: it leads to stress and disillusionment, which make us vulnerable to depression. How can you distinguish depression from ordinary sadness? Here are the classic symptoms:

- Diminished interest or pleasure in most activities.
- Significant weight loss or weight gain without effort, or loss of appetite.
- Difficulty sleeping, or sleeping too much.
- Psychomotor agitation or retardation.
- Fatigue.
- Feelings of worthlessness or excessive or inappropriate guilt.
- Diminished ability to think or concentrate, or indecisiveness.

II. . K.R.P.C. 1.5 Fees

A. Understanding People what were they thinking?

Dan Ariely, an expert in behavioral economics lead a great discussion on the topic of predictable irrationality. His book *Predictably Irrational: The Hidden Forces That Shape Our Decisions*, relates the story of his recovering from severe burns in a hospital. The nurses insisted that the best way to remove bandages was to not rip them off, Ariely was not convinced they were correct. He later conducted research and discovered that the most painful way, is in fact to remove the bandages slowly.

The “truth” found in experiment was, though, that the process of slow bandage removal was preferable to the nurses. (i.e. it was more intuitively ethical to cause lower levels of pain over longer period, from their perspective) Their belief was based on there intuition that slowly was better because they handle the intense infliction of pain on there patients. Ariely’s experiments went on to address cheating and ethical behavior.

These experiments and research raise the question of what is rationality or ethical conduct. Technical definitions aside, we might settle for this: rationality is how we tend to think that we would behave in a given situation. We are irrational when we behave in ways that we would not expect ourselves to. Are we at all rational then? Well, for the most part, no. But how should we respond? Should we try to be more rational, or should we strategically manipulate ourselves? Maybe a bit of both, but we should certainly be aware that human irrationality always seems to be a factor, and that irrationality is the basis for some of our most cherished social norms. Reference materials on this subject are plentiful.¹⁷

When compared to compassion and social morals, as motivators money will always lose. Imagine the scene if, after Thanksgiving dinner at your mother-in-law's house, you pulled out your wallet and asked, "How much do I owe you?" Clark, Mills, and Fiske theorize that we live in two worlds; one where social norms prevail, and another where market norms make the rules. Social norms such as reciprocity are warm and fuzzy, with no explicit quid pro quo. Market norms are explicit and hard--you get what you pay for. You can't mix social and market norms where sex is involved. You can't wine and dine a woman and then say, "You know, this relationship is costing me a lot of money." As Woody Allen said, "The most expensive sex is free sex."

¹⁷ Ori and Rom Brafman, *Sway: the Irresistible Pull of Irrational Behavior*

Ariely and Heyman conducted the following experiment. Subjects were asked to use a computer to drag circles from one side of the screen into a square. They were instructed to drag as many circles as they could in 5 minutes (Ariely notes that this is very boring).

- The rewards given for the task were: \$5, \$0.50, and zero
 - \$5: 159 circles
 - \$0.50: 101 circles
 - Zero: 168 circles
 - Participants worked harder under non-monetary social norms than for payment!

A real-life example: The AARP asked lawyers to participate in a program where they would offer their services to needy employees for a discounted price of \$30/hour. No dice. When the program manager instead asked if they'd offer their services for free, the lawyers overwhelmingly said they would participate.

- Conclusion: Market norms drive out social norms.

To follow up on the experiment, they ran it again, this time with the rewards of a box of Godiva chocolates (worth ~\$5), a Snickers bar (worth ~\$1), and zero

\$5 (Godiva): 169 circles;

\$0.50 (Snickers): 162 circles

Zero: 168 circles

- Conclusion: Small gifts don't constitute a market norm, and keep things in the social realm

One more variation: The experimenters described the gifts as a \$5 box of chocolates and a \$0.50 candy bar. The results were the same as with the cash rewards. They reacted to explicitly priced gifts in exactly the same way they reacted to cash. "People are willing to work free, and they are willing to work for a reasonable wage, but offer them just a small payment and they will walk away." Vohs, Mead, and Goode: Participants were asked to unscramble sentences that were either neutral ("It's cold outside") or related to money ("High-paying salary"). Then they were asked to solve a puzzle. The experimenter left the room, and the subjects were allowed to go to him for help.

- "Salary" participants waited 5.5 minutes to ask for help; "neutral" participants waited only 3 minutes
 - Thinking about money made people more self-reliant and less willing to ask for help.
 - On the other hand, they were less willing to help others. The conclusion is that thinking about money puts one in a market frame of mind.
 Subjects were:
 - More selfish and self-reliant
 - Wanted to spend more time alone
 - Were more likely to select individual tasks rather than those that required teamwork
 - Chose to sit farther away from others
- Gneezy and Rustichini studied the effect of fining parents who picked up their children from daycare late
 - Imposing a fine had long-term negative effects. Without a fine, parents felt guilty about being late (Ariely dryly notes, "In Israel, guilt seems to be an effective way to get compliance"). Imposing a fine inadvertently replaced social norms with market norms. Parents decided to since they were being fined, they could decide whether or not to be late, and frequently chose to be late.
 - A few weeks later, the day care center removed the fine, but the situation worsened. Rather than reverting to social norms, parents now concluded that there was no penalty for tardiness.
 - Conclusion? "When a social norm collides with a market norm, the social norm goes away for a long time. In other words, social relationships are not easy to reestablish. Once a social norm is trumped by a market norm, it will rarely return."

Companies that try to market based on social norms ("like a good neighbor...") but fail to follow through (e.g. imposing nuisance fees) end up in a worse position. Consumers take personal offense when a relationship framed as a social exchange turns out to be a market one. "If you're a company, you can't have it both ways. You can't treat your customers like family one moment and then treat them impersonally (or worse, as a nuisance or competitor) a moment later when this becomes more convenient or profitable. This is not how social relationships work. If you want a social relationship, go for it, but remember that you have to maintain it under all circumstances." That's what a social relationship delivers."

When trying the premise that a salary alone will not motivate people remember those who risk their lives. Police officers, firefighters, soldiers--they don't die for their weekly pay. It's the social norms--pride in their profession and a sense of duty--that will motivate them to give up their lives and health." When dealing with clients always remember that money, as it turns out, is very often the most expensive way to motivate people. Social norms are not only cheaper, but often more effective as well.

III. Diligence K.R.P.C. 1.3 Focus Focus Focus

1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Why Options Distract Us from Our Main Objective

In 210 BC, Xiang Yu led an army against the Ch'in Dynasty. While his troops slept, he burned his ships and smashed all the cooking pots. He explained to his troops that they had to either fight their way to victory or die. His troops won 9 consecutive battles. Eliminating options improved the focus of his troops.

We feel compelled to preserve options, even at great expense, even when it doesn't make sense. Ariely and Shin conducted an experiment on MIT students. They devised a computer game which offered players three doors: Red, Blue, and Green. You started with 100 clicks. You clicked to enter a room. Once in a room, each click netted you between 1-10 cents. You could also switch rooms (at the cost of a click). The rooms were programmed to provide different levels of rewards (there was variation within each room's payoffs, but it was pretty easy to tell which one provided the best payout).

Players tended to try all three rooms, figure out which one had the highest payout, and then spend all their time there. (These are MIT students we're talking about). Then, however, Ariely introduced a new wrinkle: Any door left unvisited for 12 clicks would disappear forever. With each click, the unclicked doors shrank by 1/12th. Players jumped from door to door, trying to keep their options open. They made 15% less money; in fact, by choosing any of the doors and sticking with it, they could have made more money. Ariely increased the cost of opening a door to 3 cents; no change--players still seemed compelled to keeping their options open. Ariely told participants the exact monetary payoff of each door; no change. Ariely allowed participants as many practice runs as they wanted before the actual experiment; no change. Ariely changed the rules so that any door could be "reincarnated" with a single click; no change. "Players just couldn't tolerate the idea of the loss, and so they did whatever was necessary to prevent their doors from closing, even though disappearance had no real consequences and could be easily reversed."

What we need to do is to consciously start closing some of our doors....We ought to shut them because they draw energy and commitment from the doors that should be left open--and because they drive us crazy. Even when you get down to two doors, choosing is still difficult.

"Choosing between two things that are similarly attractive is one of the most difficult decisions we can make. When we focus on the similarities and minor differences between two things, we fail to take into account the consequences of not deciding. Flip a coin and move on."¹⁸

B. Distinguishing Heart Attacks from indigestion in Your Law Firm

In the late 1990s, Cook County Hospital started a project that may one day earn the hospital as much acclaim as any of their earlier accomplishments. Cook County changed the way its physicians diagnose patients coming to the ER complaining of chest pain.¹⁹

The problems faced by the Emergency Department cried out for special attention. Because so few Cook County patients had health insurance, most of them entered the hospital through the Emergency Department. There were long lines down the hall and the rooms were jammed. A staggering 250,000 patients came through the Emergency Department every year.

The question of how to deal with heart attacks was front and center. A significant number of those people filing into the ED, on average about thirty a day, were worried that they were having a heart attack. And those thirty used more than their share of beds and nurses and doctors and stayed around a lot longer than other patients. Chest-pain patients were resource-intensive. The treatment protocol was long and elaborate and worst of all maddeningly inconclusive. So when it comes to chest pain, doctors gather as much information as they can, and then they make an estimate. The problem with this is that it isn't very accurate.

Every year, the hospital found itself spending more and more time and money on people who were not actually having a heart attack. A single bed in Cook County's coronary care unit, for instance, cost roughly \$2,000 a night — and a typical chest pain patient might stay for three days, yet the typical chest pain patient might have nothing, at that moment, wrong with him. Is this, the doctors at Cook County asked themselves, is this any way to run a hospital?

The hospital's director, Reilly, turned to the work of a cardiologist named Lee Goldman. In the 1970's, Goldman got involved with a group of mathematicians who were very interested in developing statistical rules for telling apart things like subatomic particles. Goldman wasn't much interested in physics, but it struck him that some of the same mathematical principles the group was using might be helpful in deciding whether someone was suffering a heart attack. So he fed hundreds of cases into a computer, looking at what kinds of things actually predicted a heart attack, and came up with an algorithm, an equation, that he believed would take much of the guesswork out of treating chest pain. Doctors, he concluded, ought to combine the evidence of the ECG with three of what he called urgent risk factors: (1) Is the pain felt by the patient unstable angina? (2) Is there fluid in the patient's lungs? and (3) Is the patient's systolic blood pressure below 100?

¹⁸ This particular irrationality is covered well in "The Paradox of Choice"

¹⁹ Edited excerpt from Hussain Varawalla's review contrast and compassion to Hospital design work in his Review of "Blink" by Malcolm Gladwell. Hussain Varawalla is Director-Design Services at Hosmac India Private Limited

For each combination of risk factors, Goldman drew up a decision tree that recommended a treatment option. For example, a patient with a normal ECG who was positive on all three urgent risk factors would go to the intermediate unit; a patient whose ECG showed acute ischemia (that is, the heart muscle wasn't getting enough blood) but who had either one or no risk factors would be considered low-risk and go to the short-stay unit; someone with an ECG positive for ischemia and two or three risk factors would be sent directly to the cardiac care unit, and so on.

Goldman worked on his decision tree for years, steadily refining and perfecting it. But at the end of his scientific articles, there was always a plaintive sentence about how much more hands-on, real-world research needed to be done before the decision tree could be used in clinical practice. As the years passed, however, no one volunteered to do that research, not even at Harvard Medical School, where Goldman began his work, or at the equally prestigious University of California at San Francisco, where he completed it. For all the rigor of his calculations, it seemed that no one wanted to believe what he was saying, that an equation could perform better than a trained physician.

For two years, data were collected, and in the end, the result wasn't even close. Goldman's rule won hands down in two directions: it was a whopping 70 per cent better than the old method at recognizing the patients who weren't actually having a heart attack. At the same time, it was safer. The whole point of chest pain prediction is to make sure that patients who end up having major complications are assigned right away to the coronary and intermediate units. Left to their own devices, the doctors guessed right on the most serious patients somewhere between 75 and 89 per cent of the time. The algorithm guessed right more than 95 per cent of the time.

For Reilly, that was all the evidence he needed. He went to the ED and changed the rules. In 2001, Cook County Hospital became the first medical institution in the country to devote itself full-time to the Goldman algorithm for chest pain, and if you walk into the Cook County ER, you'll see a copy of the heart attack decision tree posted on the wall.

Why is the Cook County experiment important to fire stations? Because we take it as a given that the more information we decision makers have the better off we are. If the specialist we are seeing says she needs to do more tests or examine us in more detail, few of us think that's a bad idea. But what the Goldman algorithm says quite the opposite. All that extra information isn't actually an advantage at all; that, in fact, you need to know very little to find the underlying signature of a complex phenomenon. All you need is the evidence of the ECG, blood pressure, fluid in the lungs, and unstable angina.

Goldman's algorithm indicates that the role of other factors is so small in determining what is happening to the client right now that an accurate diagnosis can be made without them. In fact, that extra information is more than useless. It contaminates the decision. It's harmful. It confuses the issues. What screws up people when they are trying to select choices and predict outcomes is that they take too much information into account. The problem of too much information not only explains why doctors make the mistake of missing a heart attack entirely, and it also explains why Lawyers fail to recognize when a stress affecting their judgment is creating unethical behavior.